IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4549 OF 2004

Saquib Abdul Hamid Nachan .. Applicant.

V/s.

The State of Maharashtra & Anr. .. Respondents.

Shri Mihir Desai for the Applicant.
Ms. P.H. Kantharia, APP with Shri Suresh Gholkar, APP for the Respondents.

CORAM : A.M.KHANWILKAR, J.
DATED : MARCH 23, 2005

PC :-

1. This application is filed under section 25(2) of the Prevention of Terrorism Act, 2002, praying for transfer of the trial of POTA Special Case No.2/2003 from the file of Shri A.P.Bhangale, being the Special Judge under the POTA, to some other Special Judge under the said enactment.

2. This Application is filed on the assertion that the applicant has reason to believe that he is not likely to get justice at the hands of the concerned judge. In all 10 circumstances are pressed into service to justify the apprehension so

entertained by the applicant. Without going into the question whether relief prayed in this application can be granted on the stated assertions/ circumstances under section 25(2) of the Act, I shall proceed to examine the same on merits on the assumption that the same are available. For, prima facie, the power to transfer a case under this provision is entrusted to the Supreme Court or High Court as the case may be only "having regard to the exigencies of the situation prevailing in a State", that too on the limited grounds (a) to (c) specified therein. In other words, clauses (a) to (c) in sub-section (2) will have to be construed ejusdem generis with the opening words of that sub section which provides "having regard to the exigencies of the situation prevailing in a State". No more and no less.

3. Be that as it may, reliance is placed on the observations of the Apex Court in the case of Manak Lal vs. Dr. Prem Chand Singhvi reported in (S) AIR 1957 S.C. 425, in para -4, wherein the Apex Court has expounded the test to be applied for considering bias attributed to the Presiding Officer of the court. It is observed by the Apex Court that, what is to be considered is whether there is a reasonable ground for

assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. Reliance is also placed on the decision of our High Court reported in 2004 ALL MR (Cri) 2951 in the case of Nilesh Jap Daru vs. State of Maharashtra, wherein the proposition expounded by the Apex Court has been followed and relief granted to the petitioner on the said reasoning. The reported decisions which are pressed into service in which the Petitioner therein succeeded, were on the facts of that case. In the case before the Apex Court, it was noticed that the Member of the Tribunal, Shri Chhangani had filed Vakalatnama on behalf of Dr. Prem Chand in proceedings under section 145 of the Code of Criminal Procedure and had in fact argued the case on his behalf. It is on that basis, applying the test expounded in the said decision, the Apex Court proceeded to consider the case before it. In so far as, in the case of Nilesh Jap Daru (supra) is concerned, the court has adverted to the peculiar facts of that case that the concerned Judge, was not willing to hear the applicant before him and in fact had threatened the accused time and again that he will

be sent to jail because of the mistake of his lawyer. The allegations in that case were that the learned judge was determined to send the accused to jail to ensure his and his lawyer's presence at the trial. To justify the apprehension, circumstances were placed on record including that the judge refused to release the petitioner from custody and application for stay of the order passed by him was also rejected and the petitioner was directed to be taken into custody forthwith. Ordinarily, there can be no difficulty in accepting the proposition as is canvassed as it is well settled that the test is not whether in fact bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the Tribunal. However, the case on hand has its peculiar background.

4. Ten circumstances stated in the application, which have been culled out in the form of a Chart handed down during the course of the argument and which are the only grounds pressed at the hearing (though the chart mentions 11 circumstances but at the hearing counsel for the Aplicant gave up the first

circumstance of simultaneous custody); in my opinion, are nothing but facade or smoke-screen created to justify the relief claimed for the reasons best known to the applicant and perhaps out of desperation. I would advert to this aspect a little later.

5. The argument canvassed before this court is that the Court ought not to consider individual circumstance and discard the same one after the other, so as to hold that the apprehension expressed by the applicant is not a reasonable apprehension, but the court will have to take into account the totality of all the circumstances together and then ought to examine whether there is a reasonable and sufficient ground for the applicant to entertain the apprehension in his mind that he will not get justice from the concerned judge. In my opinion, however, neither the individual circumstance nor the totality of the 10 circumstances which are pressed before this court would persuade me to take the view that the apprehension of the applicant is reasonable and genuine. I shall presently elaborate this aspect. I am more than convinced that the Accused have resorted to all means, as is seen from the record of the case, to ensure that the trial does not commence or progress

further. The applicant has been named as accused in the offences in relation to bomb blast at Mulund, Vile Parle and Bombay Central, being special case No. 2/2003. In all 16 accused have been named. The record indicates that the applicant has been filing one after another applications for innocuous reliefs as can be seen from the chart appended to the reply filed before this court by the State, from pages 284 to 291, Exh. A to the affidavit. It is seen that so far 19 (ninteen) applications have been filed before the trial court, 9 (nine) proceedings before High Court and one before the Apex Court. The trial judge has had occasion to record his helplessness in proceeding with the matter due to the attitude of the Accused. It will be useful to refer to the observations made in the order passed by the trial court dated 16th July, 2004 from pages 292 to 306 of the paper book. The court has highlighted some of the circumstances under which the matter has to proceed. Time and again, the accused in the case have resorted to making reckless, baseless allegations - initially against the investigating agency, then against the special prosecutor and now as it appears against the presiding officer, namely, the special judge in seisin of the trial of such a sensitive case. It is obvious

that it is a concerted effort of the Accused and all applications have been moved by the applicant from time to time thoughtfully only to protract the proceedings and not to permit the court to proceed with the framing of the charge for which the trial was notified before him on various dates. It was necessary to highlight the background in which the matter has been brought before this court.

6. The first circumstance pressed before this court is that the applicant was remanded to police custody without hearing. It is stated that on 23rd of May, 2003 in the morning, the applicant was remanded to judicial custody in relation to some other criminal case arising out of Ghatkopar bomb blast, pending before the same judge. But after his Advocate had left the court room after a few minutes later, the Judge proceeded to remand the applicant to police custody in respect of the present case which is special case No 2/2003, which order, it is alleged that, was passed in the chamber of the concerned judge and the applicant was not even heard. This allegation has been countered in the reply filed on behalf of the State. In para 17 of the reply, it is categorically denied that the remand order was passed in the chamber

by the trial court or without affording any opportunity as alleged. Be that as it may, the fact remains that the order passed on 23rd May, 2003 remanding the petitioner to police custody came to be passed in connection with the present case, which remand order was passed for the first time in relation to the present cases i.e. Vile Parle bomb blast case. This order has not been challenged by the applicant, assuming there was any procedural irregularity. It is obvious that all the cases listed on a given day will not be called out together, but in succession. After the first case was over, it is possible that the Applicant's Advocate must have left the court and did not make himself available when the present case was called out. At any rate, the order was passed in open court in the presence of the Applicant. Besides, the allegation made in the application is not substantiated by the trial court record. In my opinion, this ground is plainly false and after thought ground pressed into service for the first time before this court, at this distance of time, only to seek sympathy of this court. This circumstance, therefore, cannot give rise to a doubt about the fairness of the trial or bias of the judge, muchless a reasonable doubt by any standard.

7. The second circumstance on which the transfer of the case is sought, is that, no affidavit was filed by the prosecution alongwith the remand application praying for remand of the applicant to police custody from judicial custody. This argument clearly overlooks the fact which emerges from the record that the prosecution had asked for remand to the police custody in relation to the present case. The applicant was already in judicial custody and was produced for the purpose of further remand in relation to another case arising out of Ghatkopar bomb blast, which is case No. 1/2003. Viewed in this perspective, an affidavit in support of the remand application to seek police custody of the applicant in relation to the present case, which had arisen out of Bomb Blast at Mulund, Vile Parle, was wholly unnecessary and not required under section 49(2)(d) of the Act. Be that as it may, even the orders passed by the trial court on 23rd May, 2003 and 16th June 2003 have been allowed to become final. As there has been no procedural irregularity, the question of attributing any bias to the trial court judge for passing order on the remand application as presented by the prosecution, does not stand to reason.

8. The next circumstance pressed into service on behalf of the applicant is that, the public prosecutor moved report for extension of time for filing of the chargesheet. The public prosecutor had applied for 30 days further time for filing of the chargesheet on the ground that the transcripts of certain documents were not yet ready. The trial court acceded to that prayer of the prosecution by extending time upto 37 days, by an order dated 8th July, 2003, when in fact extension sought was only of 30 days. Moreover, Applicant was not heard before the order was passed. This allegation has been countered in para 19 of the reply affidavit. In the first place, the period of 37 days is computed by the applicant from the original date of the report/ application. The trial court judge in his order dated July 8, 2003, however, has granted outer limit till 14.8.2003. Be that as it may, the grievance regarding the approach of the trial judge was put in issue by the applicant before this court, which, however, has been negatived by this court by a speaking order on 29th of August, 2003 and which view, I am informed, has been confirmed even by the Apex Court. In otherwords, the applicant is once again raising the same bogey which has already been

considered and answered against the applicant, in the form of the present application. That cannot be countenanced. In any case, it is clear from the record that the chargesheet came to be filed by the prosecution much before the expiry of the period provided by the trial court judge on 19.7.2003 i.e. within 11 days from the date of the order dated 8th July, 2003. To get over this position, the grievance made on behalf of the applicant is that the ground mentioned in the report for extension of time is that transcript of certain documents were not yet ready, that position remained unaltered even when the chargesheet was filed on 19th July, 2003 as it was not accompanied by the transcript of the stated documents. Moreover, the Judge did not insist for filing of transcripts. It is argued that if the chargesheet was filed on 19th July, 2003 without transcript of the stated documents, there was no reason for the prosecution not to file chargesheet within the stipulated period instead of asking for extension of time. This argument has no relevance to the issue that arises for consideration before me. The issue that arises in the present proceedings is whether bias can be attributed to the Judge in granting extension of time or for not insisting to file the transcripts.

In my opinion, the circumstance pressed into service cannot be the basis to attribute bias to the trial judge, or to entertain the apprehension that the trial judge was biased against the applicant muchless a reasonable apprehension.

9. The next circumstance pressed into service on behalf of the applicant is that the discharge application filed by the applicant on 18th December, 2003 was not heard for over three months. However, the same was eventually allowed by the trial judge on March 4, 2004, on the statement made by the public prosecutor that no case was made out against the applicant in respect of the alleged offence. This grievance has been countered in para 31 of the reply affidavit. Moreover, there is nothing on record to show (nor it is alleged) that the applicant after filing of the discharge application dated 18th December, 2003, which was in another case arising out of Ghatkopar bomb blast, made any attempt to move the said application before the trial judge for listing of the said application and the trial judge refused that prayer. Besides, there is no allegation that the said application was on board but the trial judge refused to hear the same without any reason or unnecessarily

adjourned the hearing to deny relief to the applicant. That is not the argument canvassed on behalf of the Applicant. Viewed in this perspective, the fact that subsequently, the prosecution made statement that no offence was made out against the applicant in respect of Ghatkopar bomb blast case, cannot be the basis to attribute bias to the trial judge or to entertain reasonable apprehension that the applicant may not get fair trial at the hands of the concerned Judge.

10. The next circumstance pressed into service is that the trial judge was discriminating in favour of another accused one Sachin Vaze. It is alleged that the applicant is not allowed to meet his relatives while he is in court nor allowed to eat food during production. Whereas, the Judge has not taken any serious note of the accused Sachin Vaze, who is accused and arrested under the offence of MCOCA Act and even though he was photographed using mobile while in custody, was simply let off, without ordering an enquiry in that behalf. It is then alleged that on the other hand when the relatives of the accused were seen with mobile phone, an enquiry was ordered by the trial judge against them. This allegation is indeed a serious one. The allegation is, however, countered in

paras 22 to 25 of the reply affidavit. Moreover, on closer scrutiny of the record, it appears that the same is wholly baseless and ill advised. In so far as the episode of Sachin Vaze is concerned, he was photographed by some journalist at a place far away from the court premises i.e. at Byculla, accompanied by the police officer. The trial judge cannot be blamed for not taking any action in relation to that episode which had happened outside the court premises, much less to attribute bias against the trial judge for having shown favour to Sachin Vaze or to have bias against the applicant herein. On the other hand, so far as the episode of the relatives of the accused in the present case is concerned, it is matter of record that the relatives of the accused were found in the court premises taking photographs with the help of camera mounted in the mobile phone. The court has passed a speaking order to take action in respect of that episode and, in my opinion, for good reasons. That by no standard can be the basis to attribute bias against the Judge or said to be a reasonable apprehension that the applicant will not get justice at the hands of the concerned judge. In so far as the grievance that the accused have not been allowed to meet their relatives or allowed to eat food during

production, the same is illfounded. That restriction is on account of the prison rules and for security of the accused persons who are named in such a sensitive case for the reasons recorded in a speaking order passed by the judge. Significantly, it is not the case of the applicant that such condition is not adhered to in respect of all the accused in that case or that the judge has relaxed that condition in respect of any one accused. If it is so, that can be no basis to attribute bias or said to be a reasonable apprehension.

11. The next circumstance pressed into service on behalf of the applicant, is that, the judge vide order dated 9th October, 2003, directed that the accused should not be produced in the court, which was totally in disregard of the rights of the accused to remain present in the court on every date when the case is listed before the court. It is also alleged that the applicant was not even heard before the said order was passed. Even this allegation by itself is a serious one. But once again, on close scrutiny of the record, it appears that the allegation is totally misplaced and is only a subtle way of making false accusation against the trial judge. The trial judge has

considered the circumstances which necessitated passing of the said order, as can be seen from the order dated 09-10-2003. I fully endorse the opinion of the trial Judge that it is not an ordinary circumstance in which such direction has been issued by the trial judge. The trial judge is expected not only to control the proceedings before him but also to ensure that the decorum of the court is properly observed and not sullen. If the course adopted by the trial judge is only to ensure the proper control of the situation, especially when the case on hand is most sensitive one, no fault can be found with the trial judge and, that cannot be made as a ground to entertain apprehension of bias against the judge. Moreover, it is seen that no prejudice was to be caused to the applicant by that arrangement, as the trial was yet to commence. Whereas, the said arrangement was in the interest of all concerned. For passing such order, which is for the purpose of administration of justice, the same does not become tainted because the applicant alleges that he was not heard before passing the order. As mentioned earlier, the aforesaid circumstances entertained by the applicant are nothing but figment of his imagination and a facade or smokescreen created to justify the

reliefs claimed. Perhaps, it is one more attempt to prolong the proceedings for one reason or the other, best known to the applicant.

12. The next circumstance pressed into service by the applicant is about the non supply of documents to the applicant inspite of the direction given by the trial court on 28th November, 2003. The direction was to supply the documents within six months from the date of the order but that direction was not complied with. On the other hand, the discharge application preferred by the applicant was proceeded with and finally disposed of on 13th May, 2004. In the first place, the documents which were to be supplied in terms of the order dated 28th November, 2003 are not forming part of the chargesheet. Besides, it is seen that subsequently, the applicant made a formal application in writing on 23rd June, 2004 to restrain the prosecution from serving copies of the said documents on him at a belated stage. The trial judge has considered the grievance of non-supply of the documents in his order dated 23rd June, 2004 at page 103, which order is a speaking order, running into six pages. Be that as it may, this court while considering challenge to some other order passed by

the trial judge at the instance of the applicant, vide order dated 5th November, 2004, has permitted the applicant to take out fresh application for discharge for the reasons recorded in the said order. Interestingly, no grievance was made before this court about non supply of the documents as were required to be furnished in terms of the order dated 28th November, 2003. It is also not in dispute that the applicant has already filed fresh application for discharge before the trial judge and the same is pending for consideration. The learned public prosecutor on instructions has stated that the documents which are referred to in the order dated 28th November, 2003 will be filed alongwith further report under section 173 (8), if at all the prosecution intends to rely on the same as relevant materials. In any case, non-supply of the documents by the prosecution cannot be the basis to attribute bias to the trial judge. The trial judge has considered the grievance made in the application preferred by the applicant as soon as it was brought before him, by his order dated 23rd June, 2004. That is the view taken on the judicial side by the trial judge. If the applicant is in any way aggrieved by the said order, he should have taken the matter before

the appropriate court, if so advised. This has not happened in the present case. Suffice it to observe that the circumstance pressed in to service, by no standard, would give rise to a reasonable apprehension to be entertained that the applicant will not get justice at the hands of the concerned Judge.

13. The next circumstance pressed into service on behalf of the applicant is that the discharge application preferred by the applicant was heard on March 25, 2004, in the absence of the applicant, even though the applicant had expressed his desire to argue that application in person. It is alleged that the argument of public prosecutor was heard on 12th April, 2004 and 13th April, 2004 without producing the applicant from jail. Whereas, the applicant asked to provide written notes of the prosecutor, which request was not entertained. This grievance is totally incorrect and in fact contrary to the record of the case. The order of the trial court clearly indicates that the applicant was fully heard in the matter, as he argued the matter in person. The order is a speaking order. It is seen that in an appeal which came before this court against some other order, in which the applicant invited direction that he may be

permitted to take out fresh discharge application before the trial judge, no grievance was made about non-supply of written notes of the prosecutor or for that matter he was not offered fair opportunity to pursue his earlier application for discharge. The applicant was granted liberty to file fresh application for discharge for the reasons recorded by this court in its order dated 5th November, 2004. In the circumstances, even this ground is without any substance and cannot by any standard said to be reasonable apprehension entertained by the applicant about bias or that he may not get justice at the hands of the trial judge.

14. The next circumstance pressed into service on behalf of the applicant is that the trial judge did not permit the accused to make application- in- person but changed the prevalent practice in the court by ordering that all the applications to be moved by the accused persons shall be moved through their advocates. That an application which did not comply with the said direction, filed by the applicant on 6th July, 2004, was not entertained by the trial judge. There is no substance in this grievance. The reason why such a course was adopted by the trial judge can

be noticed from the speaking order passed by the trial judge. That order uniformly applies to all the accused and does not single out the applicant. In that order, the trial judge has noted that on many occasions, applications are filed by the accused without the knowledge of their Advocate, which results in postponement of the case. It was noticed that Advocates appearing for the accused were not even aware about the applications filed by their clients in person. The said directions were issued only with a view to properly regulate the proceedings, which was in the interest of the accused, so as to ensure early trial of the case. If such was the approach of the trial judge, there is absolutely no reason to entertain the apprehension expressed by the applicant, muchless to be labelled as reasonable one.

15. The last circumstance pressed into service on behalf of the applicant is that the application was filed by the prosecution for attachment of the property of the applicant. That application was filed on 22nd of August, 2003 and even though it was pending for long time, exparte order came to be passed on that application on 19th October, 2003 without notice to the applicant. Copy of the order as passed on 9th

October, 2003 is not produced by the applicant but only copy of the writ issued on the basis of that order has been produced on record. It appears that the said application was moved urgently by the public prosecutor on the basis of information that there was likelihood of the applicant and his relatives disposing of the property at any moment during the pendency of the trial. The fact remains that the said application has been finally disposed of by a speaking order dated 12th/13th February, 2004, after hearing all concerned. That order has not been questioned before any court so far. It is not for this court to go into the correctness of the reasons stated in the said order. The substance of the view taken by the trial judge is that it was necessary to pass the said order of attachment in the fact situation of the present case, so as to give effect to the statutory provisions in the said Act. If it is so, there can be no tangible basis to even suggest that the apprehension expressed by the applicant is a reasonable one.

16. On considering the individual circumstance referred to above, or for that matter together, to my mind, in either case, by no standard, it can be

accepted to be sufficient or reasonable apprehension entertained by the applicant that he will not get justice at the hands of the trial judge. Indeed, no grievance has been made that the applicant was insulted, illtreated, threatened or reprimanded by the concerned judge at any time or that any offending remarks were made by the judge which would manifest bias towards the applicant. The dexterity in pleadings, therefore, cannot transform the non-existing reasons into a reasonable apprehension necessitating a "drastic order" to be passed by this court. The argument that the court should consider the grievance from the stand point of the applicant has no basis, as the edifice raised by the applicant in this application is founded on incorrect fact situation. On the other hand, from the various circumstances emerging from the record, it leaves no manner of doubt that the accused have resorted to all possible moves by taking out successive applications and proceedings and, concerted effort has been made, making it impossible for the trial judge to frame the charges against the accused or even to proceed with the trial in respect of such a serious offence. It has been so recorded by the trial judge in the speaking order as passed by him. There is no reason

to doubt the correctness of that position. In my opinion, long list of allegations or insinuations, skilfully smocked together, which are replete with falsehood and distorted version, can never be the basis to accept the plea that the same would give rise to any apprehension to be entertained by the accused muchless a reasonable one, that he may not get justice at the hands of the concerned Judge. If this court was to accede to the relief claimed by the applicant on such circumstances, that would entail in allowing the accused to reap advantage of the facade or smokescreen created by him to justify the relief and allow him to succeed in his ulterior designs. Besides, it is possible that, this application is a subtle attempt to indirectly brow beat the trial judge, so that he would go slow or be indulgent to the accused, who has so far acted firmly and maintained the dignity of his office in every adverse situation, so as to ensure that the trial proceeds to its logical end in accordance with law. Such unscrupulous attempt should, if I may say so, be nipped in the bud.

17. In my opinion, the present application is nothing but abuse of process of the court. The same deserves to be dismissed with exemplary costs.

However, as it arises out of criminal proceedings, I would refrain to do so, even though, I am convinced that, it is frivolous and vexatious and on which quite some time was spent by this court to ascertain the grain of truth in the allegations made in the application. In my opinion, the matter deserves to be examined by the Advocate General of Maharashtra in the context of the provisions of the Maharashtra Vexatious Litigation (Prevention) Act, 1971, having regard to the successive applications filed by the accused.

18. The application is dismissed with the abovesaid observations.

19. While parting I may, however, record a word of appreciation for the fair and balanced presentation of submissions made by Shri Mihir Desai, learned counsel espousing the cause of the Applicant.

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